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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 344

PUGET SOUND POWER & LIGHT COMPANY, A CORPORATION, APPELLANT,

vs.

THE CITY OF SEATTLE, A MUNICIPAL CORPORATION, APPELLEE.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, ch. 229, Section 1; 43 Stat. 937 (U. S. C., Title 28, Sec. 344) provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "SECTION 237(*a*.) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit can be had, * * * where is drawn in ques-

tion the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B.

Statute of the State the Validity of Which is Involved.

The validity of a taxing ordinance of the City of Seattle, a municipal corporation, existing under and by virtue of the laws of the State of Washington is involved. The ordinance is numbered 62,662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges, defining offenses; and providing penalties.

Be it ordained by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds

from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. *'Occupation License' Required.*—After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

* * * * * * *

SECTION 5. *Occupation Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(*a*) * * *

(*b*) * * *

(*c*) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the

total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

. . . . . .

SECTION 6. *City of Seattle Subject to Tax.*—Subdivisions (*b*) and (*c*) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

. . . . . .

SECTION 15. *Taxpayer to Keep Books and Records. Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such

statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C.

The date of the judgment sought to be reviewed is June 14, 1933.

The petition for allowance of an appeal is presented on the 19th day of June, 1933.

D.

Nature of Case and Ruling Below.

Plaintiff, Puget Sound Power & Light Company, brought the action in the Superior Court of King County, Washington, to (1) enjoin defendant, the City of Seattle, from collecting from plaintiff the license tax prescribed by Ordinance No. 62,662, and to restrain any attempt by the city

to enforce the ordinance and its penalties against plaintiff; and (2) to recover from defendant the sum of $9,697.75 with interest from July 1, 1932, which amount, under protest, plaintiff had paid to defendant as the first monthly installment of the ordinance tax.

Inter alia the following facts were alleged in the amended complaint:

Plaintiff is a public utility corporation organized under the laws of the State of Massachusetts and as such since 1912 has been and is engaged in the electric light and power business in the State of Washington, including the City of Seattle, Washington (paragraph I).

Plaintiff has a license from the State of Washington authorizing it to engage in said business in the entire State of Washington (paragraph XVII).

Plaintiff is lawful owner and holder of an operating franchise granted by defendant, the City of Seattle, which does not expire until March 14, 1952. By said franchise plaintiff is granted the right to construct, maintain and operate in the City of Seattle equipment and apparatus for the distribution of electric light, heat and power (paragraph VII).

Defendant, the City of Seattle, is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington. In a proprietary capacity and for profit defendant has been for many years and now is engaged in the business of selling and furnishing electric light and power to the public for hire within the corporate limits of the City of Seattle, and has been and is engaged in direct and active competition with plaintiff in such business (paragraph II).

The defendant, the City of Seattle, has sole and exclusive power to fix and determine the rates at which it sells electric light and power to its customers and is not in any

respect regulated by the State of Washington or its Department of Public Works (paragraph III).

The rates charged by plaintiff for the electric light and power which it sells to its customers are subject to the exclusive control and regulation of the Department of Public Works of the State of Washington. Defendant, the City of Seattle, under the laws of the State of Washington, has no power of supervision, control or regulation of plaintiff's rates, rules, regulations and practices (paragraph IV).

The property of defendant used by it in its proprietary electric light and power utility business is exempt from city, county and state property taxes (paragraph III).

Plaintiff is required to pay annual taxes for state, county and city purposes upon all of its property (including its franchise granted by defendant) used in its business in the amount of many thousands of dollars (paragraph IV).

All persons in the City of Seattle who desire to purchase electrical energy for light and power purposes may purchase same only from the City of Seattle or plaintiff. Defendant is actively engaged in soliciting customers in the City of Seattle to whom it may sell electric light and power, and is actively soliciting customers of plaintiff to cease purchasing electric light and power from plaintiff and to make purchases from the city. In order to retain its customers plaintiff is obliged to sell its electrical energy used for light and power purposes at rates no higher than the rates fixed and determined by the city as the rate to be charged the city's customers (paragraph V).

Plaintiff cannot secure relief from a confiscatory excise tax imposed upon it by the City of Seattle through application to the Department of Public Works of the State of Washington for authority to increase its rates. If plaintiff were authorized to charge rates higher than the rates

charged by the city, and did so, plaintiff would lose all of its customers. The City of Seattle has not increased its rates for electric light and power since the enactment of its ordinance No. 62,662 (paragraph XX).

The City of Seattle annually for hire in its proprietary capacity sells to itself in its governmental capacity all of the electric light and power used by it for lighting the public streets and other municipal purposes at rates fixed and determined by the city, regardless of the market value of same and regardless of the price at which same could be secured in the open market. For such electric light and power the city in its governmental capacity annually pays itself out of the moneys in the general fund of the city, which general fund is supported by property taxes collected by the city. The amount of such payments is in excess of $438,000 annually (paragraph VI).

The City of Seattle has financed its proprietary electric light and power business by the sale of revenue bonds in amounts in excess of thirty million dollars. The principal and interest of said bonds are payable only out of the gross revenues of the city's light and power business. Such bonds are by the law of the State of Washington and by the express terms of each of said bonds prior liens upon the city's entire gross revenue from its light and power business—taking precedence even over operating charges (paragraph IX).

After alleging the enactment of Seattle Ordinance No. 62,662 (paragraph XII) and the payment by plaintiff under protest of the first monthly installment that would be due thereunder if said ordinance were valid and enforceable as to plaintiff, the amount of said monthly payment being $9,697.75, it is alleged that by said ordinance defendant is not required to pay the license fee or tax therein specified out of revenues received by defendant from its

proprietary business of selling electric light and power, or at all, and that the ordinance is in no respect enforceable against defendant (paragraph XIV) and does not impose any such tax upon appellant's competitor, namely, the City of Seattle.

The validity of the ordinance in its application to plaintiff was challenged *inter alia* upon the following grounds:

Plaintiff charged that under the facts alleged, in its application to plaintiff, the ordinance (1) would be repugnant to the Fourteenth Amendment to the Constitution of the United States in that the enforcement thereof against plaintiff would deny plaintiff equal protection of the law and deprive plaintiff of its property without due process of law; and (2) would be repugnant to Article I, Section 10, of the Constitution of the United States, in that such application to plaintiff would impair the obligation of the operative franchise contract between plaintiff and defendant; and (3) would constitute an oppressive and confiscatory exercise by defendant of a governmental power of taxation in aid of its proprietary business of selling electric light and power for profit; and (4) would constitute an appropriation and would result in a spoliation of plaintiff's property without compensation; and (5) would constitute unlawful and oppressive discrimination in that the ordinance tax would be exacted of plaintiff but would not be exacted of plaintiff's competitor, the City of Seattle, which is engaged in the same identical business in a proprietary capacity for profit.

The validity of the ordinance was also challenged as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States because Section 2 of the ordinance, and particularly the definition of "gross income" therein, is vague, indefinite and uncertain with respect to the amount of the tax to be paid

and the method by which the amount may be ascertained to an extent that men of "common intelligence must necessarily guess at its meaning and differ as to its application."

Defendant demurred to plaintiff's amended complaint. The trial court sustained the demurrer and entered a judgment dismissing plaintiff's action. Upon appeal by plaintiff to the Supreme Court of Washington, which is the highest court in the State of Washington in which a decision in the suit could be had, the validity of the ordinance was by said court sustained and the judgment entered by the trial court was affirmed.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal, to-wit:

1. A municipal ordinance is a statute within the operation of the Act of February 13, 1925, Ch. 229, Section 1; 43 Stat. 937 (U. S. C., Title 28, Sec. 344).

King v. *Augusta*, 277 U. S. 100.

2. As to denial of equal protection of the law and deprivation of property without due process of law:

Educational Films Corp. v. *Ward*, 282 U. S. 379.

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 390, 402.

Texas Electric Service Co. v. *City of Seymour*, 54 Fed. (2d) 97.

Los Angeles Gas and Electric Co. v. *City of Los Angeles*, 241 Fed. 912. (Affirmed 251 U. S. 32.)

Frost v. *Corporation Commissioner*, 278 U. S. 515, 522.

Atchison, etc., Railroad Co. v. *Matthews*, 174 U. S. 96.

3. As to impairment of obligation of franchise granted to plaintiff by defendant:

Los Angeles v. *Los Angeles Gas & Elec. Corp.*, 251 U. S. 32.

4. As to the vagueness and uncertainty of the definition of "gross income":

Connolly v. *General Construction Co.*, 269 U. S. 385.

Champlin Refining Co. v. *Commission*, 286 U. S. 210, 243.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 344).

Respectfully submitted,

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